EXHIBIT C

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DONALD J. TRUMP, et al.,

Plaintiffs,

-vs- Case No. 20CV007092

JOSEPH R. BIDEN, et al.,

Defendants.

MOTION HEARING AND DECISION

December 11, 2020 Hon. Stephen A. Simanek
Presiding

APPEARANCES

James Troupis and George Burnett, Attorney at Law, appeared on behalf of the Plaintiff/Petitioners, Donald Trump and Vice President Michael Pence.

John Devaney, Attorney at Law, appeared on behalf of President Elect Joseph Biden and Vice President Elect Kamala Harris.

Matt O'Neill, Attorney at Law, appeared on behalf of President Elect Joseph Biden and Vice President Elect Kamala Harris.

Andrew Jones, Attorney at Law, appeared on behalf of the Milwaukee County Clerk, George Christenson, and the Milwaukee County Elections Commission.

David Gault, Dane County Corporation Counsel, appeared on behalf of the Dane County Clerk and the Dane County Board of Canvassers.

Steven Kilpatrick, Assistant Attorney General with the Wisconsin Department of Justice, appeared on behalf of the Wisconsin Elections Commission and its chairperson, Ann Jacobs.

Kristin Menzia, RMR, CRR, Official Court Reporter

P R O C E E D I N G S

THE COURT: Calling Case 2020CV-007092. Donald J. Trump, et al., versus Joseph R. Biden, et al. This matter's set for a hearing. Counsel, your appearances, please.

ATTORNEY TROUPIS: This is James Troupis on behalf of the Plaintiff/Petitioners, Donald Trump and Vice President Pence.

ATTORNEY DEVANEY: Good morning, Your Honor. John Devaney on behalf of President Elect Biden and Vice President Elect Harris.

ATTORNEY O'NEILL: Good morning, Your Honor. Matt O'Neill, also on behalf of President Elect Biden and Vice President Elect Harris.

ATTORNEY JONES: Good morning, Your Honor. Andrew Jones of Hansen Reynolds on behalf of the Milwaukee County Clerk, George Christenson, and the Milwaukee County Elections Commission.

ATTORNEY GAULT: Good morning, Your Honor. David Gault, Dane County Corporation Counsel, on behalf of the Dane County Clerk and the Dane County Board of Canvassers.

ATTORNEY KILPATRICK: Good morning, Your Honor. My name is Steven Kilpatrick,

Assistant Attorney General with the Wisconsin Department of Justice, representing the Wisconsin Elections Commission and its chairperson, Ann Jacobs.

THE COURT: Mr. Burnett I think is last. Have we heard from him?

THE CLERK: We have not.

Mr. Burnett, can you please state your appearance?

ATTORNEY BURNETT: George Burnett on behalf of the Plaintiffs.

THE COURT: I think that's everyone. Okay. Everyone has made their appearances. This matter is the continuation of a hearing pursuant to the statute with regard to the recounts in Dane County and Milwaukee County.

The paperwork has been filed. There's been a complaint filed. Answers have been filed. Issue is joined. Before we begin on oral argument, which is what we have left to do on this summary-type proceeding, there are a couple of housekeeping matters that have to be taken care of.

I was advised by the Clerk that a number of parties wish to file amicus briefs, and

there was at least one request to participate by Zoom in this proceeding. I will elicit any comment by counsel, but I think we have a full house already.

I think the issues can be properly addressed by everyone who is presently here, and I don't see any need to muddy the waters by allowing people to intervene or file amicus documents.

Anyone have any objection to me just outright ruling that we will not allow anyone else either as an amicus or participant in the Zoom hearing? Hearing none, I will simply order that those requests are hereby denied.

We also, since yesterday, have had a motion filed with regard to excluding affidavits of Meagan Wolfe and Kim Wayte. There's been a motion filed and there's been a response filed to that motion.

Does the moving party wish to be heard on that motion, motion to strike, because it's outside the record?

ATTORNEY BURNETT: Yes, Your Honor. Very briefly. This is George Burnett. I think in response, we would make three, possibly four

points.

The first is that, as the court has pointed out, this is an abbreviated summary procedure. The Court's essentially sitting as an appellate court, reviewing the decisions made by the Milwaukee and Dane County Board of Canvassers. The statute at play here, 9.01 subpart eight, indicates that unless a very good reason exists for taking additional facts, the Court is to be confined to the facts made in the record below.

To that point, the Wisconsin Elections Commission responds indicating that it was not a party to the proceedings below and therefore it should have an opportunity to present additional facts as well. I would point out that neither the Board of Canvassers were technical parties. They were not litigants to those proceedings below, although they are also parties here. The board -- The Commission received the petition and was involved in the recount from the start.

Certainly the information that is being offered now was available to the Biden campaign and could have been introduced in the

recount proceedings.

And further, if you read 9.01 subpart eight in context and add in subpart six, it seems clear that what the statute is referring to when it talks about parties is parties to the recount proceeding. The alternative is to allow the Commissioner and the Boards to supplement the record, which makes it near impossible for the Court to review what the Board of Canvassers did below.

The last point I would make addresses the Wolfe affidavit in particular. That affidavit, especially paragraphs eight through 10, constitutes largely a summary, conclusions drawn from data. The data would have been available for the recount proceedings and the data itself is not offered, supplied or available. So there is no way to measure or test the conclusions that Miss Wolfe draws from that data.

And indeed, she talks about the conclusions as being rough conclusions. She uses the word "roughly" a number of times. In a courtroom proceeding, that kind of testimony would unlikely to be admitted.

So unless the Court has any questions, our point is that 9.01 subpart eight does not authorize the admission of additional evidence like this.

THE COURT: There was a --

THE REPORTER: I'm sorry, Judge?

THE COURT: There was a response filed? No one wants to respond?

ATTORNEY BURNETT: I think Mr. Kilpatrick has authored something, Your Honor.

ATTORNEY KILPATRICK: Yes, Your Honor. Thank you very much. I couldn't hear you at first. Just a quick response.

That the Commission certainly was not a party before the Board of Canvassers. Wasn't a participant either. And so it did not have the opportunity to enter into the record any evidence. Whether the other co-defendants here had such opportunity is irrelevant to the Commission's inability to enter into evidence before the Commission -- I'm sorry. Before the Board.

We were not a participant clearly, the Commission or Commissioner Jacobs.

Commissioner Jacobs and the Commission determined the election so was not participating before the Board of Commissioners -- the canvassers.

Also with regard to the data in Ms. Wolfe's affidavit, that is public data. I believe that there were other parties who had requested data regarding indefinite confined voters that could have been obtained publicly by the Plaintiffs. And so there's really nothing controversial about that data.

With regard to Miss Wayte's affidavit, again, that goes to, as Ms. Wolfe's testimony and statements, goes to the Commission's defenses. The Commission, again, because it wasn't a participant before the Board, had no opportunity to raise defenses. And this evidence is crucial to some of the defenses such as laches and equal protection that the Commission makes and raises in its brief.

So I believe it would be prejudicial to the Commission in defending this lawsuit if these affidavits and attachments were stricken.

THE COURT: Any response, Mr. Burnett?

ATTORNEY BURNETT: Just very briefly,

Your Honor. The Commission's role in this entire proceeding is a bit unusual. As Mr. Kilpatrick correctly points out, the Commission did not play an active role as a litigant in the proceedings before the Board of Canvassers, nor should it have. Because the Commission obstensible is supposed to be a neutral governmental agency. It should not be favoring one candidate or the other.

That role doesn't change by virtue of the fact that the statutes require the Commission to be served with a notice of appeal and with a complaint in this case. If you look at the complaint, the only allegations pertinent to the -- certified right these election results.

Depending on this Court's decision, it may be compelled to do something vis-a-vis that certification, but its role should remain a neutral governmental agency that neither -- that favors neither candidate.

THE COURT: As was indicated, this is a summary proceeding. It's essentially an appeal being heard in a circuit court. The statute makes clear that the Court is limited to the record that was made at the time of the recount.

The affidavits proposed here were not made part of that record. I will, therefore, grant the motion of the Petitioner/Appellant to strike those affidavits. We will limit ourselves to what was available, what was made available at the time of the recount. So the motion is granted.

I believe that takes care of all the housekeeping matters that we have. It's the Court's intention to allow counsel to present oral argument. I should note that I've reviewed all of the pleadings, the briefs. The briefs have had extensive appendices attached to them, hundreds of pages. I reviewed hundreds of pages of transcripts from the recounts and the exhibits that were attached as well. So I expect counsel can relatively briefly present their oral arguments.

As you well understand, time is of the essence here. In less than 100 hours, the electors meet to vote, next Monday, the 14th. And it's this Court's intention to wrap this thing up this morning.

So Mr. Troupis, I think you're lead counsel for the Petitioner/Appellants, go ahead.

I'm not setting a hard time limit, but I expect people to be concise.

ATTORNEY TROUPIS: Yes. Having sat in your role, Your Honor, I understand very well. First of all, I want to thank you. This was a task you were given by the Chief Justice, and it's an enormous task. And I think I speak on behalf of everyone in saying thank you to you.

I candidly also want to thank opposing counsel and I want to do that publicly. They're courteous, their civility, their pleasantness is a part of being a part of the Wisconsin Bar. And whatever else goes on elsewhere in the country, here the lawyers have acted with extraordinary civility and courtesy. And I want to thank them for their effort both during the recount and during these proceedings.

As Your Honor mentioned just a moment ago, I will limit my remarks to three items not otherwise addressed in the papers. First, I want to address the laches extensions that have occurred here. Second, I want to address W.E.C.'s role, which I think has been misunderstood in these proceedings. And third, I want to address a statute that had not previously

been raised. Section Wisconsin 227.40 which is a declaratory judgment statute.

So let me start with the laches question. It's important to remember that the role of this court is that of reviewing court. It's stuck with the evidence. Your Honor just mentioned exactly that. There's no speculation now. There's no guessing at what people know. There's no guessing at what the record has.

Now, why is that important? It's important here because the opposing parties now rely on an intensely factual question, laches. Laches requires an enormous amount of proof about what the parties knew, when the parties knew it, what other parties relied upon.

None of that evidence is in the record. There's nothing in this record that was introduced with regard to what Donald Trump or Mike Pence knew about Wisconsin election laws or knew about the claims that were now being made.

It's sort of a situation where defendants or oppositions just saying, well, they must have known. That's not enough. That can never be enough. We have a record. Everything in our petition, everything before the Court was

in front of the canvassing boards. The parties apparently knew they were gonna raise this objection. They could have put evidence in.

But you will look, for example, at Biden findings of fact 47 to 51, which are the ones dealing with laches. And you will note there is not a single substantive reference to the record. Not one.

Now, why is that? Because they don't have any facts that support the proposition that President Trump and Vice President Pence had knowledge that relied on that knowledge to the detriment of another party. For that matter, there's no evidence that the Biden campaign or the canvassing boards or the clerks or anyone relied on the fact that Donald Trump had not raised these matters. And that's the second prong.

So they neither satisfy the first prong, which is a factual prong about our knowledge, about the knowledge of the Plaintiff, that he sat upon, with the intent of causing harm, nor is there any evidence that other parties even relied upon that. On the contrary, there's evidence they relied on other things but

not Donald Trump's failure to raise this.

What's also fascinating is whether or not the Biden campaign knew about these same problems in statutes. The same issues that might ultimately arise in these proceedings. My guess is with all of their legal counsel and all the brains on the other side of this proceeding, they did know about them. They knew full well and they in fact took advantage of these things throughout the campaign. But even that's not necessary and it's not in the record.

The point I make is that laches is intensely factual. There is no facts supporting the propositions that they have asserted here, and there's no reliance. If this is important, really important in an election case of this type, because if you could rely on an assumption, which is apparently what they're doing, there's an assumption that a candidate and a candidate's committee are aware of every possible legal concern that might arise in a recount, we would be required, if that's the law, then we would be required, the Trump campaign, would be required to sue 72 counties, 595 municipalities, because all of them administer the laws in their

jurisdictions. And we would be required to examine every one of their processes and procedures in advance or be stuck with the idea that we couldn't raise those irregularities afterwards. That cannot be the law.

Moreover, the implication here of allowing a defense like this without any evidence whatsoever, where does it stop? What if one is running for circuit court judge and they think they're going to win but they don't? They lose by 10 votes. Turns out 25 envelopes were altered. Well, does the circuit court judge, is he required to raise those? Obviously know about them? Well, maybe not. Maybe not a circuit court judge because that's an office we have many of.

But what about Governor? Well, the Governor has lots of resources. So in a Governor's race, we would assume other things. No facts needed, just assume it. Well, what about assembly? What about people running for assembly? That's kind of significant.

The point I'm making, as a matter of policy, the law requires there be facts to support a laches claim. There are no facts in

this case. None were introduced and none are even being offered.

We go to the second point that I mentioned I'd like to go to, which is a misunderstanding. I'll call it a misunder-standing. It might be a misdirection. But either way, the question of W.E.C.'s role here, that's the Wisconsin Election Commission, I think there's -- the briefs of the opposition misunderstand or misdirect at it because we're not asserting -- the Trump campaign is not asserting that W.E.C. violated a statute. They didn't. They're not -- They just pointed out they're not a party. The municipal clerks and the people who voted were the subjects of this recount. Not W.E.C.

Let me walk through how the claim is made. We looked at detailed records during the recount, which were made available to us, of absentee voting in Dane and Milwaukee County. We were provided digital records from both counties early in the recount process, which we were then able to analyze and determine the exact name of the in-person voters.

This is not a claim in any way, shape

or form that the election as a whole in this instance, for example, that these cases they cite where they go, well, you can't challenge an underlying referendum. That's not what we're doing. We're challenging individual ballots cast by individuals, named in the record, every single one of them identified. We took that from a digital record of in-person voting.

Nobody disagrees on those lists now. There's been no contrary evidence. Both Boards agreed, for example, when we talked about the failure to have applications exact to that list. Having gotten the list, we then asked the question of each Board, can we look at the applications? Because applications had been delivered. Big boxes of them from the municipal clerks, which is where the applications are kept. You have to have an application for absentee voting in Wisconsin.

Both Boards said no, you can't have those. We said why? And they said, because for our purposes, our clerks in Dane and Milwaukee County universally chose not to have a separate application. And the Boards will find as a matter of law and conclude that the EL-122, which

is the ballot certification envelope, not the application, it's the ballot certification envelope, we're gonna consider that an application. And in fact, it has application on it. And that was the conclusion of each Board.

So now we had the two elements of our claim. Number one, the names of individuals who voted in person; and number two, we had that there was no separate application.

Now, one can disagree, and that's the subject of this litigation, on whether applications are required, whether or not -- whether or not the ballot certification is an application. Actually there is no disagreement that an application is required. Everybody agrees on that.

But the point here is, that was our claim. We were done. That -- At that moment in time when we knew the names of the people, when we knew that there was no separate application, our claim was completed. That's the claim. That's what we're making.

Now, what's W.E.C. role in that? Well, it turns out that after our claim list perfected, the Defendants argued that there isn't

a separate application because we're taking W.E.C.'s advice. So the claim is not that their advice was wrong. It's a defense. Rather it's the clerk's.

It's the -- The only question posed is could the clerks rely on that advice as a defense. We're not -- Whether the advice was right or wrong is irrelevant to our claim. The defense is we get a sort of get-out-of-jail-free card because we relied on W.E.C.'s advice. No matter what the statute said, we relied on W.E.C.'s advice.

Now, I think that's patently incorrect. Clearly W.E.C.'s advice cannot and does not supplant the law. It cannot. If it's wrong advice, it's wrong advice. But I'm not the only one who says that. W.E.C. itself says don't rely on our advice. You need to have separate counsel.

In the W.E.C.'s recount manual, it says, and I quote, Petitioner's candidates and filing officers should seek legal counsel when they're involved in a recount. There's a memorandum also cited in our briefs that says ultimately the decision of the Board of

Canvassers is what is challenged in court, not the advice of the Commission's staff.

That's the point. You can't rely on their advice because you have to follow the statute, whether it's right or wrong. But again, our Supreme Court has dealt directly, directly on this question. In the last term in a now relatively famous case here in Wisconsin, the *SEIU* case, which we again cite, but it's important to remember the words of the *SEIU* case, which the Defendants don't even allude to.

Here's what they say about advice from the Wisconsin Election Commission or any other administrative agency providing advice or guidance. This is what they say. They, the guidance, are not law. They do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply explain statutes and rules or they, quote, provide guidance or advice, end quote, about how the Executive Branch is, quote, likely to apply a statute or rule.

They impose no obligations, set no standards, and bind no one. They are communications about the law. They are not the

law itself. They communicate intended applications of the law. They are not the actual execution of the law. Functionally, and as a matter of law, they are entirely inert. That is to say, they represent nothing more than the knowledge and intentions of their authors, *SEIU Local versus Vos*, 220 Wisconsin 67 at paragraph 102.

I read all that language because it's as if all of that was forgotten in this case. It's as if the primary defense, we're supposed to bring actions against these regulations. But why? The regulations have no meaning. They have no force of law. If we'd have brought that case, we'd have been kicked out in two seconds under ripeness doctrines. And the reason is because the W.E.C.'s guidance is not at issue, unless somehow the Defendants come up with some law that we're unaware of that if the advice is contrary to the statute, that's okay. You can follow either the statute of the legislature or the advice of unelected bureaucrats at W.E.C.

When I state the proposition, I think it states the conclusion. You can't do it. There's no case that's ever said that. It

doesn't exist. So either laches doesn't apply and W.E.C.'s guidance is no defense at all.

Moreover, as we indicated in the record, other places including Oconomowoc, right outside Milwaukee, did this correctly under the statutes. They required the application before they provided the ballot envelope, and of course all the other arguments.

But my point here is simply, there are jurisdictions -- this record indicates there are only two jurisdictions in this record that violated these statutes, Dane and Milwaukee. I'm not saying others didn't. I'm just saying that's what the record says. And the record also says that other places complied with the statute. That's the point of the litigation from our perspective. That's the claim.

Now, the third problem that I wanted to address that wasn't addressed in the briefs, which is the statute 227.40. It's an interesting statute in that it's a declaratory relief statute. But again, because we allege nothing with regard to the W.E.C.'s regulations or guidance, there's nothing to declare. There's nothing to approach as a declaration.

We weren't required to bring anything. Because, after all, as I just said, under the *SEIU* case, those guidance are meaningless. They're not law. Moreover, some jurisdictions followed the statute, some didn't. We could not know of a claim until in fact the election happened. It's the ballots. It's the actions that count. Not a formal declaration around the state.

And again, consider that there are 500 plus municipalities. Some did it differently. Some got it wrong. Dane and Milwaukee got it wrong. We can't be obligated to seek a declaration against behavior that hasn't happened, under guidelines that are not binding, that we know are not followed in certain areas.

Finally, they seem to forget completely we're stuck with Wisconsin 9.01. Recall we were ordered by the State Supreme Court after our original action to bring our claims in the exclusive jurisdiction here before Your Honor. That's what we did.

Under 9.01(11), it provides that all actions of all irregularities are merged into this action, and this is our exclusive and only

way to address these. That was a conscious decision by the legislature to merge election law into a single place during the recount. Otherwise, of course, we'd have a plethora of litigation before, during or after elections. There's no point in it.

You want to have a situation where it actually makes a difference. Where you don't have to speculate that those 10 envelopes in Waupaca might make a difference so you better sue the Waupaca county clerk. You don't have to make that kind of decision under our statute. It's precisely written so that you aren't questioning things that we don't need to question.

We didn't know the outcome of this election last year. No one knew the outcome of the election. No one knew that it would be this close. I'm sure that the Biden campaign thought they'd win by a lot. I'm sure that Donald Trump always believes and is right thinks he's gonna win by a lot. That's good. That's what candidates do.

227.40 cannot usurp 9.01's obligation of a candidate or a right of a candidate. Because if it did, we would have nothing but

endless litigation over election laws. As I said, we don't have to here, because as I said, everybody -- the administration for, the reasons I just said.

But even 227 acknowledges this. 227.40(3) explicitly provides that in any judicial proceeding other than number one and two, some they refer to, in which the invalidity of a rule or guidance document is material, so if it were material here, I don't think it is, but if it were material to that cause of action, the assertion of the invalidity shall be set forth in a pleading of the party maintaining the invalidity during that later proceeding. Exactly.

So if we were required to do it, we could do it in these proceedings, I guess. And the Court could seek and enter a declaratory judgment. We're not barred from raising a response that W.E.C. in fact gave wrong advice if it's relevant. I don't think it's relevant. I don't think it matters. I don't think it's any -- it's an affirmative defense. The statutes say what the statutes say.

I think they got it exactly

backwards. The idea that W.E.C. supercedes the law or that W.E.C.'s advice is an absolute defense is unsupportable. There's no support in the law for that proposition of which I'm aware. It is advice. It is not law. We are not involved -- We would not be involved in endless litigation guessing at what people are gonna do or not do in a proceeding.

Your Honor, I'm glad to answer any other questions either now or in the future, but I appreciate that we have briefed extensively many of those other issues and I addressed the three I thought with some certainty I should address based upon the brief.

THE COURT: Thank you, Mr. Troupis. Mr. Burnett, did you wish to argue on behalf of Petitioners/Appellants also?

ATTORNEY BURNETT: No, I do not, Your Honor.

THE COURT: Then with respect to the Respondents, I don't know if you have among yourself decided in what sequence you will argue, but whatever way you want to go is fine with the Court.

ATTORNEY DEVANEY: Your Honor, thank

you. We have spoken among us, and I will speak first on behalf of President Elect Biden and Vice President Elect Harris. And I think it's hoped among my colleagues that I'll address most of the points. I know my colleagues are available for supplementing me or answering any questions. So if that's acceptable to Your Honor, that's how we'll proceed.

THE COURT: It certainly is. Go ahead.

ATTORNEY DEVANEY: Your Honor, really the elephant in the room here that Mr. Troupis did not address and we need to be very clear about is what are Plaintiffs' asking you to do here. They're asking you to throw out the votes of more than 220,000 Wisconsin citizens who voted in full compliance with the laws that were in effect at the time of the election.

They are asking you to do this without evidence that a single voter, not even one, voted improperly or engaged in anything remotely approaching voter fraud. And even worse, Your Honor, they're asking you to throw out the votes of only those who live in two of Wisconsin's 72 counties. They have very

cynically targeted the two most urban, non-white, and democratic counties, even though voters in the other 70 counties voted using the exact same procedures the Plaintiffs' claim are unlawful.

Counsel for Petitioner here said there's no evidence of that. That's not true. We have an affidavit from Mr. Kennedy in the record that demonstrates that these procedures were used statewide. And, Your Honor, that's not surprising because clerks do rely on W.E.C. guidance and the guidance provided for exactly the procedures that were followed in Dane and Milwaukee and around the state.

The people of Wisconsin have spoken, Your Honor. Vice -- President Elect Biden and Vice President Elect Harris won by more than 20,000 votes. President Trump sought a recount. That recount was performed diligently by Milwaukee and Dane canvassers over a course of a week to nine or 10 days. And the outcome of that was the margin of victory actually increased.

Your Honor, Justice Hagedorn just a few days ago stated that in response to precisely this type of relief, this very request for relief as a matter of fact, that the loss of public

trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

Indeed, Your Honor, the election code of Wisconsin 5.01, the first provision in it says that the election code must be construed to give effect to the will of the voters. You are being asked to do exactly the opposite. And that, of course, is entirely inconsistent with Wisconsin law and with the Wisconsin and Federal Constitutions.

It is not surprising, Your Honor, given this extraordinary request for relief that no court in the history of our country has ever come close to granting that there are many reasons why the relief should be denied.

And of course, Your Honor, you're well aware of the Court's limited scope of review in this circumstance. It's not the Court's role to substitute its judgment for the Canvassing Boards with respect to issues of fact, nor is it the Court's role to second guess questions of law that were appropriately decided or consistently decided with statute and guidance by the Canvassing Boards.

Importantly, Your Honor, the Supreme Court long ago of Wisconsin spoke to a limited aspect of review by this court. And the Court said in a *Clapp v. Joint School District* board case that the Court's role here is no greater than the duties of the Board of Canvassers and does not reach a question illegality of the election as a whole.

In fact, what the Court's role is and what the Boards of Canvassers' role was was to review ballots on an individual basis and ballot envelopes and to decide whether some should be included -- or whether some should be excluded for irregularities or not. And that is the limited role the canvassing board and Your Honor, this Court's limited role as well in this proceeding, giving deference to the canvassers.

Your Honor, I am mindful that you've read our briefs and I will not delve too deeply into our various arguments, but I do want to highlight some of the very important points.

I'll begin with the laches, equitable estoppel, and unclean hands argument that we have made. And it's very clear, Your Honor, that President Trump has been on notice of the

provisions that he is challenging in this proceeding.

In 2016, President Trump ran for President in Wisconsin. These very provisions that are being challenged now were in effect at that time. He went through a recount. These very provisions were at issue in that recount. This is in the record the fact that President Trump ran in 2016. That there was a recount in 2016. To suggest that President Trump does not have notice of this guidance from the W.E.C. is just ignoring the record, ignoring reality.

Of course President Trump had notice of the fact that, for example, the absentee in-person ballot application has been in use for more than a decade. It was in use when he ran in 2016. Likewise, the witness address information guidance from the W.E.C. and the command that clerks should fill in pieces of missing witness addresses has been in effect for more than four years and was in effect when President Trump ran for the presidency in 2016.

Similar, the indefinitely confined guidance from the Wisconsin Election Commission has been in effect for something like more than

40 years, Your Honor. And the particular guidance at issue here has been in effect since last March, and there was a Wisconsin Supreme Court decision that interpreted and affirmed that language.

And likewise, the Democracy in the Park initiative that President Trump challenges was noticed more than a month and a half before the election. And so to argue that there wasn't notice and that President Trump couldn't have known to have challenged these provisions before the election just simply defies reality and common sense and the facts in the record.

Your Honor, whether call laches, equitable estoppel, or some other equitable notion, the case law in Wisconsin and around the country establishes that any relief, much less the drastic relief that President Trump seeks here, cannot be granted where a party has slept on its rights in the way that has occurred here.

It's established by the case law cited in our brief, this principle applies with particular force in the context of elections where challenges are brought after the election and the challenges would disenfranchise voters.

Plaintiffs' delay here could not be more prejudicial to the 220,000-plus voters affected by this request for relief. The prejudice is outright disenfranchisement and a denial of their right to vote.

So, Your Honor, the equitable estoppel, laches argument applies powerfully here under Wisconsin law and law from other jurisdictions around the country.

Second, Your Honor, is the issue of voter reliance, which provides another basis for rejecting this challenge. As we discussed in our briefs, that is, all the Defendants, Wisconsin like states throughout the country, protect voters who rely on the law as it exists at the time that they voted.

Consistent with the sacred right of the constitutional right to vote, Wisconsin courts have long made it clear that any error in the administration of an election and, by the way, Your Honor, there were no errors here, but even if there had been, such an error should not result in the exclusion of any votes where voters relied on the law and the actions of election officials.

Here, Plaintiffs' entire claim rests on the assertion that voters should not have relied on the guidance of the W.E.C. and the way in which election officials administered the election. There is not a single allegation and no evidence that any voter did anything improper.

Your Honor, in this circumstance, discarding a single vote, much less 220,000, would violate Wisconsin law and the strong policy reflected in 5.01 that says we must respect and honor the will and intent of the voters. I'll elaborate upon a little further -- in a little more detail in a few minutes. It also would violate the constitutional rights of these voters, the 1st and 14th Amendment, due process rights, and the right to vote.

Third, Your Honor, this is the third reason why this challenge must be rejected, is 9.01, which counsel for President Trump has discussed. Plaintiffs' broad challenges to the W.E.C. guidance and the request to discard broad categories of ballots are simply a misuse of 9.01.

Once again, the *Clapp* case I cited earlier decided decades ago, the Wisconsin

Supreme Court made it clear that administrative irregularities underlying election process or alleged administration irregularities are not a proper subject for a 9.01 recount proceeding. The Court's been clear about that since the early 1960s, Your Honor.

These recount procedures in 9.01 establish that ballots will be viewed on an individual basis. If any individual ballot is excluded because it is improperly cast, the remedy is a random draw-down where one ballot is then removed from the total collection of ballots.

And as the Wisconsin Department of Justice very capably explains in its brief, there is no anchoring in evidence that ties the challenges here to broad categories of ballots to the individual ballots that are the exclusive focus of a recount under 9.01. And for this additional reason, the relief Plaintiff is seeking is entirely improper in the context of this recount proceeding.

And the truth of the matter, Your Honor, is notwithstanding counsel's contention to the contrary, President Trump is actually

seeking -- is actually asking you to rule on what is in effect a collateral challenge to the W.E.C. guidance and election practice. As we describe in our brief, challenges to W.E.C. guidance, and any agency guidance, are governed by Wisconsin Statute 227.41, which provides the exclusive means of judicial review of the validity of guidance issued by a state agency.

And specifically, that provision provides that it is the exclusive means of judicial review of an agency's guidance document, and that such review shall be through an action for declaratory judgment brought in the circuit court. The Supreme Court has held that this exclusive review provision is not permissive but rather than -- but is mandatory. And for that we -- I refer you to the cases as cited on page 21 of our brief.

Moreover, the only permissible relief when challenging agency guidance, such as President Trump is doing here, is prospective in response to a ruling on a declaratory judgment. Not retrospective in a way that would disenfranchise hundreds of thousands of voters, as being requested here.

Your Honor, next, the reason for another -- the additional reasons for rejecting these challenges are on the merits. And I know Your Honor is familiar with the facts relating to the four broad challenges. I won't delve too deeply into them, but there are a few points that I think must be made to make sure that the Court's fully aware of the weakness of the challenges. The first relates to -- And also the evidence in the record to support the Canvassing Board's determination.

And the first one is, of course, the absentee in-person application and the challenge to hundreds of thousands of votes on that basis or more than a hundred thousand I believe the number is. As Defendants describe in our briefs, every in-person early voter applied for an absentee ballot by completing form EL-122 entitled official absentee ballot application. That is the name of it. It says application on it. And it requires voters to complete information that other voters complete when submitting a separate application for an absentee ballot, such as through the mail.

Now, that application on EL-122 must

be completed before a voter receives a ballot. And the record evidence shows exactly how that process works. And as I mentioned before, Your Honor, this process has been in place for more than a decade. It was implemented after the 2008 presidential election, as demonstrated by the record in this case, to increase -- to address inefficiencies that were experienced with in-person absentee voting in the November 2008 presidential election.

And the way it works, Your Honor, is -- and this is in the record in the evidence as cited in our brief, a voter must show -- shows up in a clerk's office. He or she shows an ID, requests a ballot in person. The request for a ballot is entered to the Wis-Vote System. That system generates a record of application and a label for an envelope.

The voter shows the label -- the label envelope to the official, the clerk before receiving a ballot. And then the voter signs the certification on the envelope that the clerk witnesses. So you have to go -- you have to apply for the application -- for the ballot, you do so in the presence of the clerk, you receive

it, and then you complete it. So there is an application. And to suggest otherwise is just ignoring the reality of the situation and 11 years of practice with precisely this procedure.

No one has ever before objected to these practices or to the use of form EL-122. And one of the great ironies here, Your Honor, is that this form was used in 2016. And it was used to help President Trump himself get elected. Plaintiffs offer no excuse for not challenging this longstanding practice before now.

And Your Honor, the last point I'll make on this particular issue is there is no evidence that any person, not a single person who used this process of early in-person voting voted improperly or was not qualified to vote. And again, going back to 50.01, respecting the will of the voter, honoring the will of the voter, every voter who used this method was lawful. And his or her vote should be honored in the way it was cast.

Second, Your Honor, the provision of witness address information. An absentee voter must complete her ballot and sign a certification of voter on the absentee ballot envelope in the

presence of a witness. And the witness must then sign a certification of witness on the envelope, which must include the witness's address.

Now, since 2016, October 2016, the W.E.C. has instructed clerks that they must take corrective action to fill in any missing witness address information if they are reasonably able to discern that information. That guidance was approved by the Wisconsin Department of Justice under the leadership of Wisconsin Republican Attorney General Brad Schimel, it was unanimously approved by the W.E.C.'s Commissioners, and, as I said, has been followed for four years-plus since then, including in 11 statewide elections. It has never been challenged until now.

And President Trump won the 2016 election and a recount using precisely this practice. And to suggest, therefore, that he didn't know about it and couldn't have challenged it before this November is just in complete defiance of those facts.

In the evidence established, the Dane and Milwaukee election officials completed this information reliably by contacting voters, by relying on public sources to obtain witness

address information when it was missing. There's not a single piece of evidence, Your Honor, that any address added or any address information added was wrong.

And moreover, adding the address information is consistent with the purpose of the witness's requirement, which is to verify the identity of voters -- of witnesses. It facilitates contacting a witness, which is the purpose of the witness requirement. So you can -- an official can contact a witness to verify that a voter was who he or she said that she was.

And, Your Honor, I just have a few more minutes and then I will wrap up. The indefinitely confined issue. As I said earlier, it's been in place for more than 40 years and it was modified in March because of the pandemic. And the W.E.C. guidance issued on March 29th says that the indefinitely confined exception during the pandemic will be as follows. And it sets forth the ability of a voter to designate him or herself as indefinitely confined because of age, physical illness or infirmity or being disabled. It does not require permanent or total inability

to travel outside one's residence.

And the guidance goes on to explain that during the current public health crisis, many voters of a certain age or at-risk populations may meet the standard of indefinitely confined until the crisis abates. That makes sense. During this pandemic, there's much more risk for voters. The W.E.C. recognized that. The Supreme Court of Wisconsin considered this language. That case is still pending before the Court but it left that language in place and no one challenged it until now.

Now, in their brief, President Trump claims that there is a sort of suspicious spike in the number of people who claimed indefinitely confined status and that something is amiss because of that. But the truth of the matter, Your Honor, is the record shows the percentage of people who claim that status is consistent, entirely consistent with past elections.

The reason the numbers have increased is because, one, we're facing a once-in-a-century pandemic. And two, the number of people who voted, the raw number of people who voted absentee increased. So it's not surprising at

all that the number of people who claimed indefinitely confined status also increased. And again, there's not a single piece of evidence in this record that a single voter improperly claimed indefinitely confined status.

In sum on that issue, Your Honor, the guidance is consistent with the statute. There's no evidence of impropriety and Plaintiffs improperly challenged the guidance and implementation of it after the election.

And the final on-the-merits point with these four issues, Your Honor, is Democracy in the Park. And just as with the other three rulings from the Boards rejecting the Trump campaign challenges, the Board's ruling on this issue is fully supported by substantial evidence in the record.

That evidence establishes that the Madison clerk designed the event of Democracy in the Park to comply with all applicable election laws. The event was for the purpose of accommodating unprecedented demand for absentee ballots, to address the very real concerns about the postal service's ability to deliver ballots in a timely way, and to provide Madison voters

with a secure and convenient means of returning their completed ballots.

A careful chain of custody of the ballots was established, as is demonstrated by the evidentiary record in this case. And again, there is no evidence that any ballots delivered at these events, the two days that they were held, not a single one was improper or any way unlawful.

The evidence also shows, Your Honor, that both major political parties were invited to the event. And that after the lawyer for the City of Madison explained to the legislature's counsel the lawfulness of this event, no one objected to it. It was permitted to go forward. And of course, there was no pre-election challenge to it.

The evidence also shows, Your Honor, going back to my point earlier about voter reliance, that voters relied on the lawfulness of this program as represented by Madison -- accurately represented by Madison city officials. We have affidavits in the record from voters saying that they cast their votes at these events in reliance upon representations that the

events were appropriate and lawful, and that reliance must be respected and protected.

Your Honor, the claim of the -- of President Trump is that the Democracy in the Park events constituted early in-person voting under Wisconsin Statute Section 6.855. But that statute does not apply at all to this situation. The only thing voters could do, Democracy in the Park, is return sealed, completed ballots. They could not obtain or apply for ballots at that event and, therefore, 6.855 does not apply.

This was not early in-person voting. Instead, these events were governed by 6.87(4)(b)1, which is the provision that allows for ballot return locations. The Commission, the Election Commission, has interpreted this provision to allow the use of secure ballot drop boxes in a variety of circumstances and locations. This was one of those circumstances. These were staffed drop boxes in parks, and they were functionally identical to the staffed and unstaffed drop boxes that have been used for many years in Wisconsin.

Your Honor, last point on this is the statute provides that for delivery of these

ballots, delivery in-person to the municipal clerk, is permissible under 6.87(4)(b)1 and that's exactly what happened here. These ballots were delivered to agents of the clerk in the parks, entirely consistent with the expressed language of the statute.

And the Boards, therefore, properly concluded the ballots cast in these events were lawful. And once again, there's not evidence that a single person who delivered their ballots at these events voted improperly or unlawfully.

Your Honor, my final two points, and I'll be very brief on these, goes to the constitutional violations that would result from granting the relief that Plaintiff, President Trump, seeks here. And I'll focus first on due process and second on equal protection.

The procedural substantive due process issues here cry out for attention. What's being asked here is to change the rules after the game has been played. And fundamental due process prohibits that. Voters were not on notice that the rules would be changed in this way, of course. And it goes to the heart of due process that you cannot do that after the fact

and disenfranchise hundreds of thousands of voters.

I just refer you to our brief on due process, without getting into case law, but Your Honor I'm sure is very well aware, well-versed to due process law. But this would be one of the ultimate violations of both procedural and substantive due process to have the changes after the election that President Trump is seeking.

And then finally, Your Honor, is equal protection. I made the point earlier that the relief being sought here is targeted at two out of 72 counties. In the other 70 counties as I -- as the record demonstrates, voters voted in the same way. They relied upon indefinitely confined. They relied upon W.E.C. guidance, the clerks did, with respect to adding witness information.

Voters throughout the state used the form for in-person absentee voting just as the voters in Dane and Milwaukee did. And under the equal protection clause, Your Honor, it would be an egregious violation to discount just the votes of voters in Dane and Milwaukee as being requested here.

In *Bush v. Gore,* the Supreme Court said that the fundamental nature of the right to vote means equal weight afforded to each vote and the dignity, equal dignity owed to each other. Here, if the relief Plaintiffs seek were granted, 220,000 Wisconsin citizens would have no weight afforded to their vote and certainly would not be afforded the equal dignity that voters in 70 other counties are receiving.

Your Honor, for all those reasons, Plaintiffs' or President Trump's challenges and requests for relief should be denied. We respectfully ask that the Court do so.

THE COURT: Thank you, Mr. Devaney. Have you consulted and agreed on who goes next? Mr. Kilpatrick's raising your hand. Let me just check with the reporter. You're okay on the time?

THE REPORTER: Yes.

THE COURT: Mr. Kilpatrick, go ahead.

ATTORNEY KILPATRICK: Thank you, Your Honor. I will be brief. I just wanted to say that the Election Commission does not take sides in the election. The side of the Election Commission in this appeal is to defend its

decisions. And I ask that the Court, if it would take judicial notice of those Election Commission memos that were attached to Administrator Wolfe's affidavit. Those are public documents and they can be taken judicially noticed of. They're all on the website.

That also goes to the laches argument in that it is clear that the Plaintiffs had knowledge and notice of the Commission's guidance. These were all publicly-available guidance. They were distributed throughout the state to all the clerks. All the candidates and political parties had knowledge of those for years.

For example, the guidance regarding the application, it actually was created, the EL-122, approved unanimously by the Government Accountability Board, the predecessor agency of the Elections Commission, in 2009. The application began use in May of 2010 and has been used ever since. And so any challenge could have been brought literally years before.

With regard to the indefinitely confined aspect, again, the Plaintiffs were on notice of that. As this Court is aware and the

briefs make clear, there was a pre-election suit brought by a political party before the Wisconsin Supreme Court in March about a local official's statement. So it is unpersuasive that the Plaintiffs argue that they could not have brought any suit prior to the recount. It's clear in Wisconsin that that did happen months before this November election.

And I also would like to note with regard to the indefinitely confined issue is that the Wisconsin Supreme Court approved in a preliminary relief order the guidance that the Commission issued and had no problem with that back in March.

That's all I have to say. I think Mr. Devaney did a fine job providing a defense altogether with the Defendants. Thank you.

THE COURT: Who wishes to proceed next? Mr. Jones?

ATTORNEY JONES: Yes, Your Honor. I'm not sure if I was supposed to go next, but not seeing Mr. Gault raise his hand, I will go next.

And like other counsel on this side of the table, I am mindful of the voluminous

submissions that are in front of Your Honor and Your Honor's statements at the beginning of argument, so I too will keep it succinct, or at least try to. I know lawyers say they will and often don't, but I will do my best.

There's really just a few points I want to make. Picking up on some of the things that have been said in argument, and particular by Mr. Troupis, and then just to highlight a couple of other points on the various defenses that have been raised.

With respect to the laches issue, I would point Your Honor back to just the elements of that defense in Wisconsin, those elements being three. Unreasonable delay in bringing a claim; two, a lack of knowledge by the party who's asserting that defense that the other party would assert the claim; and prejudice.

And the argument that I think I hear coming from opposing counsel really goes to the unreasonable delay element. And I think the facts here, the record that was in front of these two Boards, are very clear on the issue of unreasonable delay.

And I think what opposing counsel is

trying to do now is characterize these claims or these challenges that are being brought via the recount really is being about particular voters. And of course, now at this point in the proceedings, President Trump is aware of how many voters fit into a particular category or categories as a result of the recount that occurred.

But this is not a challenge to particular voters or particular ballots. And I think that's obvious for a number of reasons, not the least of which being the way that the recount petition itself was framed. The petition was framed in terms of alleged statewide errors in the administration of the election.

I would point Your Honor to paragraphs 4-B, 5-B, 6-C and 6-E of the recount petition. Those paragraphs all allege statewide misadministration of the election. The Trump campaign knew going into the election that those alleged problems in the administration of the election were out there. It's not about individual voters or individual ballots. And the facts relating to those alleged, and I underscore alleged, errors in administration are obviously

all facts, matters of public record for reasons that the briefs explain, that Mr. Devaney and Mr. Kilpatrick have already emphasized for Your Honor. It's very clear on the record that there was unreasonable delay here.

Another point that I'd like to emphasize for Your Honor that I think is implicit in what the other defense counsel have already said, but that is that part of this strong public policy in Wisconsin that favors the counting of all votes, which is expressed in section 5.01(1) of the Wisconsin statutes and cases such as the *Zimmerman* case from the Wisconsin Supreme Court in 1949 cited by the parties, but part of that strong public policy or part of the way that policy has been enforced by the Courts is this idea that we don't throw out votes in Wisconsin when the error at issue is official error or error by election officials, rather than error or misconduct or perhaps even fraud by individual voters.

And I won't go through all those cases, but I would simply reemphasize that point and point Your Honor to the cases that we cited in our brief at pages 11 and 12. That's a line

of cases that goes back over 100 years. And I don't think there really can be any argument that what the Petitioners here are contending is that there was error by the election officials.

There is no allegation, there certainly isn't any proof of voter error or voter fraud. And I think on the strength of that line of cases, the Court really is not in a position where it can throw out votes for the reasons that are being asserted here.

I have only two brief points I want to make in terms of the merits of the claims with respect to Wisconsin election law. One relating to the in-person absentee ballots specific to Milwaukee County, and the other about the indefinitely confined absentee voter issue.

The first being that the Board in Milwaukee certainly reached the conclusion that the almost 109,000 ballots that the Petitioners are challenging, those all being in-person absentee ballots, were supported by a written application in that each and every single one of those absentee voters filled out this combined application certification form, the EL-122. So without question, there was a written application

in that form.

The Board also addressed, however, the fact that the way it works in Milwaukee County for all of those 19 municipalities is that when someone walks into the clerk's office to vote in-person absentee, the clerk, checking their ID, inputs the fact that the voter is requesting a ballot, an absentee ballot, into the my -- the My Vote system, if I've got the name right.

So in that moment when the voter is present, asking for a ballot, the clerk is essentially doing online what hundreds of thousands of other Wisconsin voters did in requesting absentee ballots through the online system. There is then a written record of that transaction, so to speak, that's created just like there is a record of every other voter who applied for an absentee ballot online in that way.

The Petitioners are not challenging those hundreds of thousands of voters who went online and asked for an absentee ballot in that way, and there is absolutely no reason to treat any of the 109,000 Milwaukee County voters who

went in and asked for a ballot in person but through that process essentially also applied online, there's no reason to treat them any differently and to throw out those 109,000 ballots.

The last point I'd like to make, Your Honor, again, on indefinitely confined, certainly the arguments made in the briefs go to the fact that the guidance that was at issue, issued by the W.E.C. in March, was essentially 100 percent correct under the law. And the Wisconsin Supreme Court said so.

But I think an even more fundamental point for Your Honor to consider is the fact that it's really nothing but supposition or speculation that the Petitioners are relying on to suggest that any or, as they argue, all of those voters in Milwaukee County, almost 20,000, were not entitled to claim indefinite confinement status.

And the argument is, well, the numbers went up, therefore, some or all of them must have been invalid or inappropriately claiming that status. But the fact of the matter is, the burden of proof was on the Petitioners at

the recount to present evidence that any of those voters inappropriately claimed that status. There was no such proof. Not any proof of a single Milwaukee County voter who should not or could not or was not entitled to claim that status. Certainly not proof beyond a reasonable doubt as the law requires with respect to any individual voter. They had the burden of proof, they failed to meet it, there is absolutely no basis to throw out any of those ballots.

I'm going to rely on the arguments in the briefs as to the curing of witness address information on the absentee ballot envelopes.

I think that to wrap up or to close, certainly it's understood that the legislature intended that absentee voting in this state be closely watched, regulated. That's clear in Section 6.84 of the statutes.

But it's also clear that this appeal does not truly serve that legislative purpose. That purpose is not served by over-technical, formalistic reading of the statutory requirements for absentee ballots. And I think it's clear, based on the submissions, that that is what is being advocated by the Petitioners.

That purpose, that legislative purpose, is not served by speculation about wrongdoing on the part of voters. And that's absolutely what is being advocated with respect to the indefinitely confined voters, if not the other categories as well. And that purpose in 6.84, that legislative purpose, does not require Your Honor to abandon the strong, longstanding public policy of the state to give effect and meaning to the right to vote and to honor the will of the electorate.

And I think being faithful to that public policy purpose, while still respecting the intent of the legislature regarding absentee voting, requires Your Honor, requires this Court, to uphold the determinations of the Milwaukee and Dane County Boards and to dismiss this appeal. Thank you.

THE COURT: Yes. Mr. Gault.

ATTORNEY GAULT: Thank you, Your Honor. I'm gonna try to be really, really brief. My primary concern in this case was two issues that were somewhat centered to Dane County and that was the indefinitely confined issue and Democracy in the Park. I think those issues have

been fully addressed by the briefs as well as argument by Mr. Devaney and don't need anymore attention here.

I do briefly just want to touch on one issue raised by Mr. Troupis this morning, and that is the role of the Board of Canvassers in reviewing absentee ballot application. And I wrote down a couple quotes here by Mr. Troupis. One was that the Board of Canvassers had an obligation to follow the statute; and number two, that the statutes say what they say. And I agree wholeheartedly with that.

I also agree that the Board of Canvassers was required to seek their own independent legal counsel and not file -- not just follow the Election Commission's guidance on that. And I can tell you, with respect to Dane County, they did because I was the one who gave them the independent legal counsel.

And what I would tell you, Your Honor, is that Wisconsin Statute Section 9.01(1)(b) sets forth a very specific procedure for the Board of Canvassers to follow in conducting the recount. It lists step by step what the Board of Canvassers are to do. It says

the recount shall proceed for each board and municipality as follows, and then those steps are listed.

As to absentee ballots, the Board of Canvassers has an obligation to examine the absentee ballot envelopes. And then there is very specific guidance on when an absentee ballot is defective. There is no mention of a review of the absentee ballot applications as part of the recount process. It simply is not something that the legislature told the Board of Canvassers they were supposed to do as part of the recount process.

And that was the advice that was given to the Dane County Board of Canvassers in conducting their canvass. I suspect they got the same guidance in Milwaukee County. And I just wanted to correct that, because there was an issue raised that somehow the Board of Canvassers didn't follow the statute by not reviewing those applications, and that's simply not the case.

Other than that, I believe all the issues have been fully briefed and those were covered, and we would rest on the briefs submitted and the other arguments of counsel.

Thank you, Your Honor.

THE COURT: Anyone else from the Respondents? If not, then Mr. Troupis, any rebuttal?

ATTORNEY TROUPIS: Yes. On a couple of items that I think are just misstated. Let me begin with the idea that there's somehow proof in this record that the clerks elsewhere in the state did things exactly like Dane and Milwaukee County. And for that, they cite the only piece of evidence apparently they have now, the Kennedy affidavit. I'm looking at the Kennedy affidavit. Kevin says nothing, nothing, about what goes on elsewhere in the state. Not a word. He is talking about the processes they went through in issuing various memoranda.

Mr. Devaney is simply wrong. There is no evidence except the evidence we introduced that in fact other counties and clerks understood these rules and they followed them and they didn't in Dane and Milwaukee County.

Second, they completely mislead this court when they say look to the will of the voter in deciding this case. No. It is of course true we want the will of the voter, but that's not the

issue. Every case they cited, every one, 100 percent that they cited on that did not deal with absentee voting or they dealt with absentee voting before 1984.

Clapp, *Zimmerman*, are all cases before the legislature stepped in in 1984 and passed explicitly, explicitly, why absentee voting ought to be regulated much more carefully. We -- And it's important to remember the words. The words are the legislature finds, this is their finding, that voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the poling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent potential for fraud or abuse, to prevent overzealous solicitation of absentee electors who may prefer not to participate, to prevent undue influence.

Why is that important? Because then they go on and say these provisions in 6.842 must be construed as mandatory and ballots cast in contravention, I'm reading from the statute of these procedures specified, may not be counted and may not be included in certified results.

So all that is wonderful, wonderful to think about about the voters and the way that they're talking about maybe elsewhere in the country. But in Wisconsin, we understood the very problem this court and we all face which is the difficulty, mere impossibility, of examining every single person who votes and determining after the fact whether they are eligible voters, whether they in fact were entitled to vote, whether they in fact cast that ballot.

All of those things are well regulated on the day of election. But in advance, none of that happens. And that's the reason why the statute is explicit and requires that you must comply with these things.

Take for example the application requirement, which is made light of here. Well, just do it at the same time. But isn't it precisely to avoid undue influence, to avoid marching people into the clerk's office at the last minute to vote, that you require an application prior to getting the absentee votes? That's a perfectly rational and, in fact, mandatory provision of the statute. It's explicit. It's not -- It's not implicit.

Folks, you -- Folks who like to argue this tend to forget the difference between those two types of votes, and all the federal courts have accepted that there is a difference and there are different rules that apply. And they are mandatory in Wisconsin.

Last item, draw-down. And it is. It feels harsh. It's what the legislature said has to be done because there's no other way to deal with individual ballots. We've complied specifically with the statute by doing that.

Now, W.E.C. makes a fascinating argument in this regard. They seem to argue that on the one hand -- Well, with regard to draw-down and due process, on the one hand, we had to comply with the statute and we could elect for two counties. But on the other hand, W.E.C. now believes the statute's unconstitutional. Well, that's an odd position for a state agency that's supposed to be administering a statute to say, but so it goes.

But remember, the Biden campaign had the absolute option, and I expect W.E.C. did as well, to count the rest of the state. They wanted seven million dollars for us to have a

recount of the rest of the state. Three million to do these two counties. We selected those two counties, and the statute explicitly says they could select any other ones they wanted. They chose not to.

The draw-down process is explicit in the statute. The question was raised and it only apply when there's certain types of ballots. Well, of course that's not true. If you look at 9.01 and its a lengthy citation, but it eventually is sub (e), it provides that you must equalize the ballots and the poling -- the roles.

When you do that, we call that a draw-down. You can call it whatever you'd like. But you have to -- you have to equalize those. That's the system that we have in Wisconsin. It's the only system. To suggest we haven't done it, which was another comment we heard, well, that's -- that's just untrue. I have not been in a recount nor has anybody here who participates in them has not had draw-downs of any significance. You have draw-downs throughout the process. It's the way we do it. And *Lee versus Paulson* stands as a case under the absentee voting statute where that is the only, only

remedy that you can have of -- under absentee voting for it to be equalized much. So the reality is that's what the statutes provide. That's apparently the only option that we have.

There is an assumption here underlying the defendant's argument, and that is that you can change the statute at will. That W.E.C. has a good idea so why not just do it. That's not the way the law works. The statutes must be complied with. Absentee voting is subject to enormous fraud. That's why this state made the choices it did, and that's why the complaint must be granted and the notice of appeal allowed and reverse the Boards of Canvassers. Your Honor, I thank you very much again.

THE COURT: Mr. Kilpatrick, you wish to respond to Mr. Troupis?

ATTORNEY KILPATRICK: Yes. Thank you, Your Honor. I just have to respond to one thing that was just said, and maybe it was a mistake or I misunderstood. But the Commission has never in this litigation asserted that the recount statute is unconstitutional. I just want to make that clear.

I think what maybe was considered by Mr. Troupis is, yes, our brief in the argument has said that there are equal protection possible violations if this court were to issue a remedy in which ballots were thrown out in two counties but not thrown out in other counties because of Commission guidance. So that is the only type of constitutional argument that we made. We certainly didn't say that the recount statute was unconstitutional. Maybe that was in some other brief or not. But, no, the Commission has never said the recount statute was unconstitutional.

But I also want to ask the Court to reconsider its denial of our -- or reconsider, yes, our position that the affidavits shouldn't be stricken, or at least with regard to Miss Wayte. Mr. Troupis just said that there is nothing in the record about what other clerks did across the state. That's exactly what Miss Wayte's affidavit says and that's what we tried to get into this record, and that was denied.

So on one hand, Plaintiffs say there's nothing in the record and on the other hand say and it shouldn't get in what other clerks do. So I do ask respectfully that the

Court reconsider its earlier decision striking at least the affidavit of Kim Wayte.

THE COURT: Okay. That appears to be it. As I indicated earlier, the Court intended to rule from the bench when all the material that is appropriately provided to the Court has been provided and considered. I am now prepared to rule from the bench.

Clearly the election laws in Wisconsin starting with Section 501, entitled scope, say except as otherwise provided, Chapters 5 through 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions. So the bottom line here is that the Court should do everything to ensure that the will of the voters prevail.

There was a hotly-contested election in Wisconsin and across the nation. In Wisconsin, it resulted in a Biden/Harris ticket receiving more votes than the Trump/Pence ticket. As a result, the Petitioners here, the Trump/Pence ticket, asked for a partial recount, a recount in two of the 72 counties. It was not a

request to recount all of the votes in the State of Wisconsin. That recount occurred making minor changes to the totals but not changing the outcome as originally reported.

Section -- Section 9.01 deals with appeals to that recount, and that's what we're here for today. I won't go through the procedural aspects. We addressed that at the time of the scheduling order. But the case is properly venued in this court, the Court has jurisdiction to make a determination on the appeal of the recount.

The right to vote at a poling place on election day is guaranteed in the Constitution. Early absentee voting is a privilege created by the legislature. Because early absentee voting is done outside the controlled environment of a poling place and therefore subject to potential fraud or abuse, the legislature can impose limitations, restrictions and regulations on how it is exercised.

Wisconsin has enacted early absentee voting with restrictions and limitations. In dispute today is whether those restrictions were

properly applied and enforced when recounting the votes from Dane County and Milwaukee County in the November 3rd, 2020, election.

The Wisconsin Elections Commission adopts rules and guidelines in accordance with the statutes, as did its predecessor, the Government Accountability Board. Those rules and guidelines must conform to the underlying early absentee voting statutes. Petitioners/Appellants allege and argue that erroneous interpretations of the law were used by the canvassers during the recounts. Respondents argue that the rules and guidelines correctly interpret the underlying election law. That's the dispute we have before us.

901.08 sets forth the scope of the review. I have to review only the recount in the two counties that were recounted. In those two counties, approximately 220,000 ballots were challenged by the Petitioners/Appellants. Those ballots were counted by the canvassers over the challenges and objections of the Petitioner/Appellants.

The job of this Court is only to determine issues relating to that particular

recount. In doing so, 9.01(8)(b) says the Court shall separately treat disputed issues of procedure, interpretations of law and findings of fact. The Court shall set aside or modify the determination of the Board of Canvassers or the Commission chairperson or the chairperson's designee if it finds that the Board of Canvassers or the chairperson or chairperson's designee has erroneously interpreted a provision of law and that a correct interpretation compels a particular action.

Sub (8)(a) says, unless the Court finds a ground for setting aside or modifying the determination of the Board of Canvassers or the Commission chairperson, or chairperson's designee it shall affirm the determination.

So really the job of this court is quite limited. I'm not here to make determinations on broad constitutional issues with regard to any potential remedies that have been requested or may be provided for.

With regard to what our issues in dispute here, really these are not procedural issues with regard to the recall itself, unlike where problems may have occurred in other states.

The COVID protocols were provided here. It made it difficult for the count to proceed, for it to be observed. But there's no real dispute here the observers were able to properly challenge ballots they thought should not have been counted. The parties reached agreement early on for a standing objection to broad ranges of ballots in the four categories that are in dispute here.

I believe the recount was transparent and open. I believe it may have even been live-streamed. There is no dispute in that regard. And I wish to thank those involved in the recounts in Dane and mad -- Dane and Milwaukee County, the canvassers, the observers, the clerks, the attorneys, everyone involved because it went rather smoothly and transparently.

There again is no real dispute with regard to factual issues. Allegations of fact were made in the complaint on this appeal. The answers essentially did not deny those allegations. The real dispute here is whether or not there were erroneous interpretations of law used in the recount in making the determination

whether a ballot should be counted or not counted.

As I indicated earlier, I've reviewed all the pleadings, briefs. I've reviewed the record, the transcripts, the exhibits. And now I have had the benefit of oral argument.

Taking all that into account, because the Court is satisfied the rules and guidelines applied in each of the disputed areas are reasonable and a correct interpretation of the underlying early absentee voting laws, the certification of the results of the 2020 Wisconsin Presidential Election, after the Dane County and Milwaukee County recounts, is affirmed.

The certified results show Joseph Biden and Kamala Harris received 1,630,866 votes, and Donald Trump and Michael Pence received 1,610,184 votes. A difference or margin of victory of 20,682 votes in favor of Biden and Harris.

The determination of the Court is that the Petitioner/Appellant here have not demonstrated that an erroneous interpretation of Wisconsin early voting laws happened here. And

in the complaint, there really is no allegation here of widespread fraud. That's not the issue. There is no credible evidence of any misconduct or wide-scale fraud.

At issue here simply is whether or not the recount occurred in compliance with the Wisconsin election laws. This Court adopts pages one through 30 of the proposed findings of facts and conclusions of law of Joseph Biden, Kamala Harris, the Dane County Defendants, and Milwaukee County Defendants, and incorporates them into this judgment of affirmance.

I have excluded from that everything after page 30 because those are arguments relating to laches, equitable estoppel and equal protection. It's not the role of this Court to determine the constitutionality of proposed remedies. The Court is simply charged with the obligation of determining whether or not the recount properly applied a correct interpretation of Wisconsin's early voting laws.

So I'm not gonna sit here and read the 30 pages of findings of fact and conclusions of law because time truly is of the essence here, as I indicated earlier. I think this is the last

litigation going on. Wisconsin's the only state that apparently missed the safe-harbor rules. And because my determination, this Court's determination can be appealed further and the Electoral College is scheduled to vote in less than 100 hours, I think it's important to wrap this up as quickly as possible.

But I just wanted to make some summary comments with regard to where the basic disputes arose. The first was approximately 5,500 dollars -- 5,500 ballots that had defective or missing witness addresses. 6.87(6d) was interpreted -- (6d) provides that a clerk may return a ballot to a voter under those circumstances. It's not mandatory, but the clerk can do so. In 20 -- It's not an exclusive remedy.

In 2015, the Wisconsin Elections Commission set down guidance for clerks to use to have -- to look at various sources to remedy or cure an incomplete or missing witness address. We're not dealing with signatures of voters or signatures of witnesses. Simply an address of a witness which was required so that if there were issues of validity, the witness could be

contacted.

The statute is silent with regard to what the Commission can do in curing a defect in a ballot. It certainly does not prohibit the clerks from doing so. Adding, the requisite information by the clerk has been in effect since before the 2016 election. The election which Trump prevailed in Wisconsin, I believe, after a recount. It's longstanding, I believe it's not prohibited by law, and it is therefore a reasonable interpretation to make sure, as the Court indicated earlier, that the will of the electors, the voters, are brought to fruition.

The second broad category where there is an issue involves approximately 170,000 ballots in the two counties is the claim by the Petitioners/Appellants that there was no written application for a ballot. We're dealing with 6.86(1)(ar) of the statutes. More than 10 years ago, the administrative agency in charge of election law developed form EL-122. It's entitled official absentee ballot application slash certification. It has been in use continuously in elections since that time. It came into effect after the 2008 election with

regard to early absentee voting in order to streamline the process.

Many methods for obtaining a ballot are authorized under the law. There can be an online application, the website My Vote, it can be regular mail application, e-mail application, or in-person application. Whenever in-person application is used, form EL-122 is used. And as was indicated, on its face it is designated official absentee ballot application certification.

The only thing that happened after the 2008 election and the adoption of EL-122 is that two steps were combined into one on the form. It's been in continuous use since then as I believe it is a correct, allowable interpretation and application of 6.86(1)(ar).

The third area in dispute is the indefinitely confined issue under 6.87 two and four. It affects approximately 28,000 votes. This statute's been in effect for more than 30 years. It allows voters to self-identify as qualifying as indefinitely confined. There is no proof needed. You don't need a doctor's excuse. An issue arose here in the spring when the Dane

County clerk apparently made Facebook postings implying that because of the safer at home orders in effect, anyone could use this particular section in order to early vote.

The problem is that this section does not require the voter ID requirements that are applicable in other sections. The Republican party immediately sued for injunctive relief. The case was *Jefferson versus Dane County*, 2020 Appellate, I believe, 557.

As a consequence of that litigation, the Commission established guidance indicating that it is the individual choice of the elector to utilize that section. That it should not be used to avoid voter ID requirements. And the language in that guidance essentially was approved by the Wisconsin Supreme Court.

I recognize that litigation is ongoing, but to infer that people utilized and voted under that section to evade the voter ID requirements, it is no basis for not counting those votes. It's far more likely because of the ongoing pandemic that people were very concerned, especially those who have compromised systems, to go out in public, to not want to stand in line

for potentially hours at a poling place in order to cast a ballot. I certainly could not strike those ballots based on an inference which is not really supported in law. Or in -- Excuse me. Supported in fact.

The last category in dispute amounting to approximately 17,000 votes are the Democracy in the Park provisions. Petitioners/ Appellants argue that 6.855 applies and that this was an inappropriate or improper interpretation of law creating a clerk's office for voting. I believe the correct application is 6.87(4)(b)1, the governing provisions relating to drop boxes or the ability to deposit a vote with the clerk.

Those drop box provisions, again, have been in use and were used around the state. The distinction here being a potential voter could not obtain a ballot at any such location. It's not an extension of the clerk's office for voting. It is simply an extension to allow a voter to deliver a completed ballot in a socially-distanced way. It certainly is an appropriate and correct interpretation of law to allow that to happen.

Because the Court has determined that

there has been no reliance on an erroneous interpretation of Wisconsin's early voting absentee laws, I indicated I'd enter judgment in favor of the Respondents. The Court will issue an order confirming the results as I've indicated, the certification that I've indicated earlier.

I will assess costs as required by law. I'm not familiar with the process here with respect to who drafts the order. I will sign either a paper copy of the order affirming the determination or I will e-sign one. That has to be done, I believe, immediately because, as I have indicated earlier, sub (9) of 9.01 says that within 30 days after the entry of the order of the circuit court, a party aggrieved by the order may appeal to the Court of Appeals.

I want to sign an order and have it in effect yet this morning. So can we agree on who does that? I have to ask the clerk whether normally the successful party drafts it. Who wants to take the lead? Mr. Devaney?

ATTORNEY DEVANEY: Your Honor, unless others on the defense side would like to do it, we'd be happy to do it.

ATTORNEY TROUPIS: We just wanted -- I'm speaking from the Trump campaign, obviously a one sentence order is what's appropriate. I mean, I don't --

THE COURT: Yeah. Yeah. Just saying, hey, the earlier determination is affirmed.

ATTORNEY TROUPIS: And that's really all it needs to say with the magic language for appeal, because obviously the Supreme Court is expecting to hear from us shortly.

ATTORNEY O'NEILL: Your Honor, the ordinary practice in Milwaukee is that the successful party drafts the order. I agree with Mr. Troupis in this case. It's best a simple order that says for the reasons stated on the record, the determinations of the Board of Canvassers as confirmed. This is an appealable form in order of right. You can draft that. I will send it to Mr. Troupis and Mr. Burnett for their approval and we --

THE COURT: I will expect it within five minutes, Mr. O'Neill. And then I will sign it electronically. We've got to keep this ball rolling.

ATTORNEY TROUPIS: Appreciate it very much, Your Honor. And thank you again for the speed with which you've handled this. And again, I appreciate, Matt, and all of defense counsel's assistance and courtesies throughout.

ATTORNEY KILPATRICK: Your Honor?

THE COURT: Yes.

ATTORNEY KILPATRICK: Your Honor, just housekeeping, just want to make sure we dot our I's and cross our T's. In the order will there be a reference to the granting of the motion to strike? And I think I made an oral request for reconsideration. I did like the Court to address that also so that everything is ready for this appeal.

THE COURT: Well, the record will show that. Mr. O'Neill, just draft a simple one or two sentence order as you indicated, file it electronically, I'll sign it electronically, and the clock will start running for any potential appeal.

ATTORNEY TROUPIS: Thank you.

ATTORNEY O'NEILL: Your Honor, the only thing I suspect everyone will want an immediate transcript, as immediate as immediate

can be. I'm sorry, madam clerk court reporter, but there's a little bit of pressure in all of that.

THE COURT: You have to deal, I believe, with Kristin. You know how she can be reached. Okay, folks. The Court would then stand adjourned.

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(Proceedings concluded.)

STATE OF WISCONSIN)
) SS:
MILWAUKEE COUNTY)

I, KRISTIN MENZIA, RMR, CRR, an official court reporter in and for the Circuit Court of Milwaukee County, do hereby certify that the foregoing is a true and correct transcript of all the proceedings had and testimony taken in the above-entitled matter as the same are contained in my original machine shorthand notes on the said trial or proceeding.

Dated at Milwaukee, Wisconsin, this 11th day of December, 2020.

Kristin Menzia, RMR, CRR
Official Reporter

ELECTRONICALLY SIGNED